

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 19, 2006 Session

CYNTHIA HEATHERLY RAULSTON v. PORTER STUART RAULSTON

**Direct Appeal from the Circuit Court for Hamilton County
No. 02D2175 Hon. W. Neil Thomas III, Circuit Judge, Div. IV**

No. E2005-02463-COA-R3-CV - FILED SEPTEMBER 26, 2006

In this divorce action, the Trial Court granted the divorce, and awarded the wife marital property and attorney's fees. On appeal, we affirm in part, reverse in part, reducing the award of marital property awarded to the wife, and reverse award of attorney's fees.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Steven M. Jacoway, Chattanooga, Tennessee, for appellant.

B. Stewart Jenkins, Chattanooga, Tennessee, for appellee.

OPINION

In this divorce action, the principal issue on appeal by the husband is the Trial Court's finding that the wife had made a substantial contribution to the husband's business, and made an award of marital property to the wife on that basis.

This action was filed by the wife in November of 2002, and in August of 2003, the Trial Court granted a divorce to the parties on stipulations pursuant to Tenn. Code Ann. §36-4-129. Additionally, the Trial Court approved the division of the parties' net equity in the marital residence on a 50/50 basis, and reserved judgment on all remaining issues.

The parties were married in February 1996, and separated in 2003, and at the time of trial the wife was 38 years old, and the husband 44 years old, no children had been born to the marriage, and both parties were in good health. The parties began dating in 1991, and the wife moved into the husband's home. They cohabited until they were married in 1996. The husband had commenced a business known as Rain Dance Irrigation in 1986, which business installed and maintained underground irrigation systems for residences and businesses, and outdoor landscaping and lighting.

The ultimate trial of the case produced a voluminous record of evidence which this Court required to be abridged.

Following the trial, the Court ruled from the bench stating the wife had made a valuable contribution to Rain Dance and that Rain Dance funds purchased the commercial building and that part of those funds were marital. The Court found the starting value of the business was negligible, and that it had a current value of \$240,000.00 at the time of the divorce. The Court ruled that the wife should receive a 25% interest of the husband's one-half interest in the appreciation in value of the commercial building, and ordered the husband to pay \$120,000.00 to the wife (plus 10% interest for one year), which represented her one-half interest in the value of Rain Dance, and also awarded the wife \$15,000.00 in attorney's fees.

The husband has appealed and argues that the Trial Court erred in finding that any interest in the husband's business and business property was marital property, and asks this Court to set aside the Trial Court's award of attorney's fees to the wife, as well.

The husband's brief suggests it was error that the Trial Court found that Rain Dance and the building owned by the husband and his father were marital property. The Trial Court did not find that these assets were marital property, but what he awarded the wife was her interest in the appreciation of those assets during the marriage, based on her contributions.

The husband argues that the wife did not make substantial contributions, and points to the fact that the marriage was of short duration, the wife was compensated for working in the company, and also had time to work at other jobs, as well.

The Trial Court found that the increases in value of Rain Dance and the commercial building were marital property subject to distribution. Tenn. Code Ann. §36-4-121 states that marital property:

includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation . . .

The statute goes on to explain that substantial contributions include those made as a wage earner or homemaker. This Court has previously held that contributions must be "real and significant", but

need not be “monetarily commensurate to the appreciation in the separate property’s value, nor must they relate directly to the separate property at issue.” *Brown v. Brown*, 913 S.W.2d 163 (Tenn. Ct. App. 1994). Whether a spouse has made a substantial contribution is a question of fact. *Id.*

Regarding the husband’s business, the wife’s contributions were both substantial and real, and related directly to the appreciation of that asset. The wife contributed to the business by working in it for free for nearly a year (while also contributing financially to the parties’ living expenses), and by continuing to work in the business thereafter, when she was a paid employee. While the wife was subsequently paid a salary, the husband was paid a salary as well, and we do not subscribe to the theory that since both were paid salaries, that neither of them contributed to the appreciation of the business.

The wife testified that she quit her paying job at Fortwood after moving with husband, and went to work for Rain Dance without salary, to help him keep the business afloat. While the initial contributions made by the wife were pre-marital, she continued to work in the business for most of the parties’ marriage, and the evidence establishes that she worked hard to help the husband make the business profitable. She not only kept the books and sent out bills, but also worked with customers, scheduled appointments, paid bills, worked with creditors, etc. The wife worked for Rain Dance for most of the marriage while going to school and sometimes while working a second job, but as the Trial Court found she substantially contributed to making the business grow and prosper. The evidence does not preponderate against the Trial Court’s finding of fact on this issue. Tenn. R. App. P. 13(d).

However, the husband further argues that the wife failed to adequately prove the value of the business at the time of the marriage, and thus did not carry her burden of proof regarding the value of the appreciation. Both wife and her expert testified that the business essentially had negligible value at the time of the marriage, and was technically insolvent. While the husband and his expert disputed this, the Trial Court found their testimony to be not credible on this issue. As such, the Trial Court found the 1996 value to be zero, and the evidence does not preponderate against this finding. Tenn. R. App. P. 13(d). As this Court has previously explained:

The value of marital property is a fact question. Thus, a trial court's decision with regard to the value of a marital asset will be given great weight on appeal. In accordance with Tenn.R.App.P. 13(d), the trial court's decisions with regard to the valuation and distribution of marital property will be presumed to be correct unless the evidence preponderates otherwise.

The value of a marital asset is determined by considering all relevant evidence regarding value. The burden is on the parties to produce competent evidence of value, and the parties are bound by the evidence they present. Thus the trial court,

in its discretion, is free to place a value on a marital asset that is within the range of the evidence submitted.

Wallace v. Wallace, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987)(citations omitted).

Regarding the commercial building, the Trial Court found the wife would be entitled to \$5,625.00 of the value of that asset, representing 25% of husband's one-half interest, basing same on the increase in husband's equity in the building after the marriage due to the mortgage payments that were paid after the parties' married. The Court reasoned these payments were made by Rain Dance, and therefore were essentially made with marital funds.

The building was clearly husband's separate property, as it was bought before the parties' marriage and was never titled in the wife's name, nor treated as marital property. The only testimony regarding any appreciation in the building was stated to be in the improvements made on it by the husband and his father, but those improvements were also made prior to the marriage. There was no proof that the wife contributed to any appreciation of this asset. Accordingly, it was improper for the Trial Court to award wife a portion of its value. Appreciation which is purely market-driven does not constitute a substantial contribution by a spouse. *Langschmidt v. Langschmidt*, 81 S.W.3d 741 (Tenn. 2002). The wife did not claim to have contributed to this asset, and the fact that Rain Dance made rental payments which helped pay the mortgage on it would be of no consequence, since Rain Dance is not a marital asset, and the wife has already been awarded an equitable distribution of the appreciation in value of Rain Dance. Thus, the Court erred in awarding the wife any portion of the commercial building, and that part of the Trial Court's award is reversed.

The husband argues that the Trial Court erred in awarding the wife pre-judgment interest of 10% for one year on the award of \$120,000.00 for the wife's interest in the appreciation of Rain Dance. The husband concedes in his brief that prejudgment interest is allowed by statute, specifically Tenn. Code Ann. §47-14-123, which states that it "may be awarded by courts or juries in accordance with the principles of equity", and also that its allowance is discretionary with the court. Thus, the award should only be reversed upon a showing of abuse of discretion. *Otis v. Cambridge Mutual Fire Ins. Co.*, 850 S.W.2d 439 (Tenn. 1992).

In this case, the Trial Court stated that an award of prejudgment interest was proper because the wife did not receive any rental payments from Rain Dance while the divorce was pending, even though those payments were to compensate the parties for the use of marital property (trucks and equipment) utilized by the business. The husband did, however, continue to make these rental payments to himself. The wife was thereby deprived of the use and benefit of funds that she would have been entitled to, and we find no abuse of discretion in awarding wife pre-judgment interest to fully compensate wife for that loss.

Finally, the husband argues the Trial Court erred in awarding \$15,000.00 in attorney's fees to the wife. He argues that such awards are in the nature of alimony in solido, and should be based on the statutory factors applicable to alimony awards, including need and ability to pay. We have stated that need is the "critical factor" to be considered by the court when deciding whether to award attorney's fees. We have also explained that an award of attorney's fees is proper when one spouse is disadvantaged and does not have sufficient resources with which to pay attorney's fees. *Herrera v. Herrera*, 944 S.W.2d 379 (Tenn. Ct. App. 1996). The award of attorney's fees is within the discretion of the trial court and will not be disturbed on appeal unless the trial court abused that discretion. *Eldridge v. Eldridge*, 137 S.W.3d 1 (Tenn. Ct. App. 2002).

We conclude that the award of fees in this case was an abuse of discretion. The wife was awarded a judgment against the husband in excess of \$168,000.00, and was basically given 50% of the marital estate, leaving the husband to take his share of the assets in mainly a non-liquid form. As we have previously stated, if a party has adequate property and income, or is awarded adequate property in the divorce, from which to pay his or her own expenses, an award of attorney's fees may not be appropriate after consideration of all relevant factors. *Ingram v. Ingram*, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986). The wife was awarded a substantial judgment, and she also earned a good salary, so no need has been shown. Accordingly, we reverse the award of attorney's fees to the wife.

However, the wife counters that the Trial Court's award of fees should be upheld on the basis of the protracted nature of the litigation, which she attributes to husband and his attorney. While the divorce case was unduly protracted, taking into account the value of the marital estate as a whole, the record does not establish that the husband and his attorney were solely responsible for the drawn-out litigation.

In sum, the Trial Court's Judgment awarding wife \$120,000.00 for her interest in the appreciation of the business during the marriage is affirmed, but the Trial Court's award to the wife of a portion of the value of the husband's interest in the commercial building is reversed, as well as the Trial Court's award of attorney's fees to the wife.

The cause is remanded for the entry of a Judgment in accordance with this Opinion, and the cost of the cause is assessed one-half to Porter Stuart Raulston, and one-half to Cynthia Heatherly Raulston.

HERSCHEL PICKENS FRANKS, P.J.